

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

April 26, 2010

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**Re:   *State of Delaware v. Ernest L. Lake***  
**Def. ID No. 0812001998, 0404003269, 0611008754, 0803023537,**  
**0702021759, 0808020260**  
**Memorandum Opinion**

Date Submitted: January 22, 2010

Dear Counsel:

This is my decision on Ernest L. Lake's Motion for Postconviction Relief. Lake was charged with three counts of Criminal Solicitation in the First Degree. The charges arose out of Lake's relationship with his former girlfriend, Lois Cooper. Lake had a 13-year relationship with Cooper that ended in January of 2006. They had two children together. Cooper worked as a deli manager for Hocker's Grocery Market, which is owned by Gerald B. Hocker, Sr., and his son, Gerald B. Hocker, Jr. Lake suspected that one of the Hockers was involved in a romantic relationship with Cooper. While Lake was incarcerated at the Sussex Correctional Institution on pending charges, he allegedly asked another inmate to murder Cooper and the Hockers. Lake was convicted of just one of the three counts of Criminal Solicitation in the First Degree on March 24, 2009. I sentenced Lake to serve five

years at Supervision Level V, suspended after serving four years at Supervision Level V for one year at Supervision Level III. Lake was also on probation when he committed this crime. I found him in violation of his probation and sentenced him to serve a total of six years and ten months at Supervision Level V, suspended after serving four years and ten months at Supervision Level V for one year at Supervision Level III. Lake was represented by Michael R. Abram, Esquire. This is Lake's first motion for postconviction relief and it was filed in a timely manner.

Lake alleges that Abram did not properly represent him because he did not object to certain evidence at trial. This included evidence that (1) Lake got drunk, went into Cooper's bedroom, tore up her clothes and took her phone, (2) Lake had Breach of Release and Protection From Abuse Orders against him regarding Cooper and her children, (3) Lake had three Contempt of Court Charges, (4) Lake had never gotten over Cooper and had a bad temper, and (5) at the time of trial there were other charges pending against Lake that related to Cooper. Lake also alleges that Abram allowed me to violate him on his probation for acts committed while he was incarcerated and allegedly not on probation. Abram filed a response to Lake's allegations. I have concluded that a hearing is not necessary given the nature of the allegations.

### **DISCUSSION**

In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.<sup>1</sup> First, the defendant must show that counsel's performance was deficient and fell below an

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

objective standard of reasonableness.<sup>2</sup> Second, the defendant must show that the deficient performance prejudiced the defense.<sup>3</sup> Further, a defendant “must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.”<sup>4</sup> It is also necessary that the defendant “rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”<sup>5</sup> There is no procedural bar to claims of ineffective assistance of counsel.<sup>6</sup>

## **I. Evidence**

The evidence in question was discussed at length by the prosecutor and Abram with me before the trial started. The prosecutor wanted to offer this evidence to give some context to Lake’s relationship with Cooper. Abram objected to some of the evidence that the prosecutor wanted to offer and convinced her to leave it out. Abram did not object to the other evidence because he believed that the prosecutor would be successful in having it admitted and because he wanted to use it himself to show Lake had done nothing bad in the past and, while not a perfect person, was certainly not capable of having someone murdered. Thus, the prosecutor and Abram planned to use the same evidence to offer

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<sup>2</sup> *Id.* at 687.

<sup>3</sup> *Id.*

<sup>4</sup> *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

<sup>5</sup> *Coleman*, 2003 WL 22092724, at \*2, quoting *Strickland*, 466 U.S. at 689.

<sup>6</sup> *Coleman*, 2003 WL 22092724, at \*1, citing *State v. Johnson*, 1999 WL 743612, at \*1 (Del. Super. Aug. 12, 1999).

differing views of Lake's relationship with Cooper.

This is not a situation where defense counsel simply failed to object without thinking about whether the evidence was irrelevant and/or unfairly prejudicial. Abram was aware of the evidence that the prosecutor wanted to offer. He objected to that evidence which he felt was irrelevant, unfairly prejudicial or both. Abram did not object to certain other evidence because he thought it was relevant and not unfairly prejudicial. Moreover, he planned to use the same evidence for his own purposes. Thus, Abram made a strategic decision about what to do regarding this evidence. To prevail on this claim, Lake must overcome a "strong presumption that counsel's conduct was reasonable or could have been considered sound trial strategy at the time."<sup>7</sup> The Court will not review actions of counsel through a lens of hindsight,<sup>8</sup> and if trial counsel investigated both the laws and facts and made reasonable strategic choices at the time of the trial, those choices are "virtually unchallengeable."<sup>9</sup> Further, counsel has no obligation to pursue legal arguments which he is convinced are not supported by the law.<sup>10</sup> Accordingly, a defendant will not receive postconviction relief merely because he is unhappy with the outcome of the trial and now wishes counsel employed a different trial strategy.<sup>11</sup> The evidence in question

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<sup>7</sup> *State v. Hammons*, 2004 WL 18746921 at \*1 (Del. Super. Aug. 11, 2004)(citing *Strickland*, 466 U.S. at 689).

<sup>8</sup> *State v. Dawson*, 681 A.2d 407, 415 (Del. Super. 1995) (quoting *Strickland*, 466 U.S. at 687).

<sup>9</sup> *Strickland*, 466 U.S. at 690.

<sup>10</sup> *State v. Gregory*, 2005 WL 3194482, at \*3 (Del. Super. Nov. 23, 2005).

<sup>11</sup> *Id.*

was relevant because it gave context to the nature of Lake's relationship with Cooper. Indeed, it would have seemed quite odd if the prosecutor had not explained the nature of Lake's relationship with Cooper and why he may have wanted to have her killed. The evidence was not unfairly prejudicial because it covered things that Lake had done as part of his relationship with Cooper. Abram also believed that much of the evidence, when fully explained, was not serious and would show that Lake, while not perfect, was not capable of murder. For example, Lake violated a no-contact order one time by simply sending a Christmas card to his children. I also gave a jury instruction regarding this evidence, telling the jury that it could not use this evidence to conclude that Lake was a bad person and, therefore, probably committed the crimes he was alleged to have committed. The jury instruction stated further that the evidence was offered to establish the nature of the relationship between Lake and Cooper. The jury found Lake guilty of only one of the three charges against him. Given that the evidence was offered for a limited purpose and that Abram made a knowing and reasoned decision about the evidence, I find that Abram's representation was not deficient and that Lake was not prejudiced by the evidence.

## **II. Probation**

Lake also alleges that Abram allowed me to violate him while he was incarcerated and allegedly not on probation. This is incorrect. Lake was on Supervision Level III probation for a number of convictions<sup>12</sup> when he was charged with two counts of

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<sup>12</sup> Cr.A. No. S07-02-1118 - Harassment  
Cr.A. No. S06-11-0532 - Criminal Trespassing in the First Degree  
Cr.A. No. S06-11-0533 - Theft less than \$1000  
Cr.A. No. S04-05-0794 - Driving Under the Influence of Alcohol  
Cr.A. No. S08-03-0981 - Criminal Contempt by Disobedience  
Cr.A. No. S08-03-0982 - Criminal Contempt by Disobedience

Noncompliance with the Conditions of a Bond. Lake was incarcerated on these new charges when he allegedly solicited another inmate to murder Cooper and the Hockers. Lake pled guilty to one count of Noncompliance with the Conditions of a Bond on October 10, 2008. I sentenced him to two years at Supervision Level V, suspended for one year at Supervision Level III. I did not know at the time of this sentencing that Lake may have solicited a fellow inmate to murder Cooper.

The State filed an Information charging Lake with three counts of Criminal Solicitation in the First Degree on December 22, 2008. The Information alleged that Lake committed the offenses between October 1, 2008, and November 15, 2008. Lake was convicted of one count of Criminal Solicitation in the First Degree on March 25, 2009. I sentenced Lake on the conviction on April 4, 2009. I also found him in violation of his probation for soliciting a fellow inmate to murder Cooper and resentenced him on all of his prior convictions the same day.

Under 11 *Del.C.* § 4333, any probation or suspension of sentence “may be terminated by the Court at any time . . . .” The Delaware Supreme Court has held that this language confers broad discretion upon the trial courts regarding the granting and termination of probation.<sup>13</sup> This discretion is so broad that a trial court may terminate a defendant’s probation for conduct that occurred before the defendant was even placed on probation.<sup>14</sup> The rationale for this is that it prevents the defendant from taking advantage of the trial court’s suspension of his incarceration without full knowledge of the defendant’s

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<sup>13</sup> *Williams v. State*, 560 A.2d 1012, 1015 (Del. 1989), See also *Perry v. State*, 741 A.2d 359, 362 (Del. 1999).

<sup>14</sup> *State v. Davis*, 2007 WL 1786154, at \*1 (Del. Super. June 20, 2007).

actions.<sup>15</sup>

Lake has no basis to complain. He was actually on probation for six convictions when he solicited a fellow inmate to murder Cooper. Lake pled guilty to the charge of Noncompliance with the Conditions of a Bond and was sentenced before I was aware of his criminal conduct that occurred either before or after he was sentenced. Once I became aware of Lake's criminal conduct, it was well within my discretion under 11 *Del.C.* § 4333 to terminate his probation on this charge and resentence him. Lake's argument is without merit.

### **CONCLUSION**

Ernest L. Lake's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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<sup>15</sup> *Williams*, 560 A.2d 1012.